MOTION FILED

JAN 3 1 2000

(2)

No. 99-950

In The

Supreme Court of the United States

CONSOLIDATED RAIL CORPORATION,

Petitioner,

v.

DARLENE M. WIGHTMAN, Administratrix of the Estate of Michelle L. Wightman, Deceased; MICHELLE WIGHTMAN CHARITABLE FOUNDATION,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Ohio

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF OF *AMICI CURIAE* THE ALLIANCE OF AMERICAN INSURERS AND NATIONAL ASSOCIATION OF INDEPENDENT INSURERS IN SUPPORT OF PETITIONER

RICHARD HODYL, JR.*
MARK R. MISIOROWSKI
Attorneys for Amici Curiae
Alliance of American Insurers
National Association of Independent Insurers

**Counsel of Record*

WILLIAMS & MONTGOMERY, LTD.
Twenty North Wacker Drive
Suite 2100
Chicago, Illinois 60606
(312) 443-3200

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* OF THE ALLIANCE OF AMERICAN INSURERS AND NATIONAL ASSOCIATION OF INDEPENDENT INSURERS IN SUPPORT OF PETITIONER.

Pursuant to Rule 37.2 of the rules of this Court, the Alliance of American Insurers and National Association of Independent Insurers respectfully move this Court for leave to file the attached brief *amici curiae* in support of the petitioner, Consolidated Rail Corporation (hereinafter "Conrail"). Petitioner consented to the filing of this brief. Respondents Darlene M. Wightman, Administratrix of the Estate of Michelle L. Wightman, Deceased and Michelle Wightman Charitable Foundation withheld their consent.

The Alliance of American Insurers (hereinafter "Alliance") and the National Association of Independent Insurers (hereinafter "NAII") represent the leading voices of the insurance industry. They rank as two of the largest property-casualty insurance trade associations in the nation. NAII is the largest in terms of membership and total premium dollars written by its members. The Alliance and NAII combined represent over 700 insurance companies across the United States.

Members of the Alliance and NAII transact business, offer insurance products, investigate claims, mediate and settle disputes, and provide legal defense to millions of corporate and individual policyholders across the United States. Companies of every size and type comprise the Alliance and NAII, from companies that conduct business in limited geographic regions to large commercial enterprises that transact business from coast to coast.

Given their national presence and daily interaction with our nation's state and federal courts, members of the Alliance and NAII are deeply concerned about issues involving access to justice, the partnership between our federal and state courts, the integrity of our nation's courts, and the fundamental protections guaranteed under the Due Process Clause.

Amici are deeply concerned about this matter because petitioner's procedural and substantive due process rights were unheeded by the Ohio Supreme Court. Procedurally, petitioner was denied an opportunity to be heard. Substantively, petitioner's due process rights were violated when plaintiff's counsel, family members of plaintiff's counsel, and plaintiff's Counsel's law firm, made substantial campaign contributions to the campaign committees of two of the sitting state court justices. These campaign contributions were made during the pendency of the appeal. Amici are greatly concerned that in the absence of meaningful review, the timing, magnitude, and sources of these contributions will accentuate negative public sentiment toward the judiciary. This negative sentiment poses a real threat to the concept of "Our Federalism."

In addition, the Amici support the total abolition of punitive damages, or in the alternative reasonable limits to the award of punitive damages, as they have a severe negative impact on member companies and their policyholders. Amici are also concerned that this case presents another instance where a jury was left to award punitive damages without any delineation of when such a punitive damage award violates due process. The Alliance and NAII are further concerned over the negative

economic and business repercussions that result when state courts uphold grossly excessive punitive damage awards which are 6,250 times greater than the compensatory award.

In view of these concerns, the Alliance and NAII respectfully request that they be allowed to participate in this case and to file the attached brief *amici curiae* in support of petitioner.

Respectfully submitted,

RICHARD HODYL, JR.*
MARK R. MISIOROWSKI
Attorneys for Amici Curiae
The Alliance of American Insurers
The National Association of Independent Insurers

**Counsel of Record*

WILLIAMS & MONTGOMERY, LTD.
Twenty North Wacker Drive
Suite 2100
Chicago, Illinois 60606
(312) 443-3200
Dated: January 31, 2000

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATEMENT OF INTEREST OF *AMICI CURIAE*	1
SUMMARY OF ARGUMENT	1
ARGUMENT	3
THE OHIO SUPREME COURT'S REFUSAL TO ADDRESS PETITIONER'S DUE PROCESS CHALLENGE THREATENS PRINCIPLES OF "OUR FEDERALISM."	3
THE OHIO SUPREME COURT'S SILENCE IN RESPONSE TO PETITIONER'S DUE PROCESS CHALLENGE VIOLATES DUE PROCESS UNDER ANY TEST THIS COURT HAS EXPATIATED	6
A PUNITIVE DAMAGE AWARD IN AN AMOUNT 6,250 TIMES GREATER THAN THE ASSOCIATED COMPENSATORY DAMAGE AWARD IS UNCONSTITUTIONALLY EXCESSIVE	9
CONCLUSION	11

TABLE OF AUTHORITIES

Page

CASES

Aetna Life Ins Co. v. Lavoie, et al., 475 U.S. 813 (1986) 7

BMW v. Gore, 517 U.S. 559 (1996) 10

Gulf Offshore Co. v. Mobil Oil Corp., et al., 453 U.S. 473 (1981) 3, 4

Honda Motor Co. v. Oberg, 512 U.S. 415 (1994) 10

In re Murchison, 349 U.S. 133 (1955) 7, 9

Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123 (1951) 6

Marshall v. Jerrico, Inc., 446 U.S. 238 (1980) 6, 7

Martin v. Hunter's Lessee, 14 U.S. 304 (1816) 2, 4

Nixon v. Shrink Missouri Gov't Pac, et al., ___ U.S. ___ (2000) 2,

Offutt v. United States, 348 U.S. 11 (1954) 7

Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1 (1991) 10

Patterson v. New York, 432 U.S. 197 (1977) 2, 6

Public Utilities Commission v. Pollack, 343 U.S. 451 (1952) 7

Seaboard Air Line R. Co. v. Seegers, 207 U.S. 73 (1907) 9

Taylor v. Hayes, 418 U.S. 488 (1974) 7

Tumey v. Ohio, 273 U.S. 510 (1927) 7

TXO Production Corp. v. Alliance Resources Corp., et al., 509 U.S. 443 (1993) 9, 10

TABLE OF AUTHORITIES – Continued

Page

Withrow v. Larkin, 421 U.S. 35 (1975) 6, 9

Younger v. Harris, 401 U.S. 37 (1971).....3, 4

STATUTES & CONSTITUTIONAL PROVISIONS

U.S. Const. amend. XIV, Section 1..... 10

OTHER AUTHORITIES

The Federalist No. 82 (Hamilton) 1, 3

STATEMENT OF INTEREST OF AMICI CURIAE[1]

The interest of *amici curiae* the Alliance of American Insurers and the National Association of Independent Insurers is set forth in the motion accompanying this brief.

SUMMARY OF ARGUMENT

Federal and state courts are kindred systems, joined in purpose by the doctrine of "Our Federalism." The Federalist No. 82 (Hamilton). This extraordinary partnership empowers state courts to serve as coequal guardians of our constitutional rights. Vested with this solemn authority, state courts share a vital responsibility to uphold the Constitution as supreme and to zealously ensure that all litigants enjoy the fundamental protections of a fair and impartial tribunal. Sadly, these sacred principles were overlooked by Ohio's highest court.

Conrail filed a motion to recuse/disqualify certain members of the Ohio Supreme Court after it learned that plaintiff's counsel, family members of plaintiff's counsel, and plaintiff's law firm made substantial contributions to the campaign committees of two members of that court. The contributions were made during the appeal. Rather than address Conrail's challenge to these contributions, the Ohio Court remained silent on this issue, then ruled

---

[1] Counsel for a party did not author this brief in whole or in part. No person or entity, other than *amici curiae*, their members, or their counsel, made a monetary contribution to the preparation and submission of this brief.

in favor of the plaintiffs on the merits of this case. Understandably, this silence heightened Conrail's concern that it was denied due process.

Amici are troubled by this judicial silence, and agree that when state courts turn a blind eye to allegations of bias or prejudice, due process protections are rendered meaningless. *Patterson v. New York*, 432 U.S. 197, 201-202 (1977). Here, fundamental notions of fairness compelled the Ohio Court to uphold the Fourteenth Amendment, follow well established precedent, and to speak the truth in response to the questions raised by petitioner. The Constitution demands no less. Amici request that the petition be granted so Conrail may receive the constitutional protections it is due.

Amici also believe the Ohio court's refusal to consider Conrail's due process motion ignores this court's teachings in *Martin v. Hunters Lessee*, 14 U.S. 304 (1816), and violates the spirit, letter, and underlying rationale upon which the doctrine of "Our Federalism" was created. Amici believe that if we allow state courts to remain silent in the face of fundamental due process challenges, we will have effectively undermined the sanctity of "Our Federalism."

Amici are also concerned that the Ohio court's silence will heighten public perception that substantial campaign contributions may tip the scales of justice. Such extreme circumstances foster public resentment and distrust of all judicial proceedings. *Nixon v. Shrink Missouri Gov't Pac, et al.*, ___ U.S. ___ (2000). Amici also support this petition to afford Conrail its procedural and substantive due process rights.

Finally, the punitive damage award assessed against Conrail, in an amount 6,250 times greater than the associated compensatory damage award, is grossly excessive and violates numerous holdings of this Court. While this Court has recognized the extreme difficulty associated with delineating a specific "line" at which punitive damage awards are unconstitutional, it is abundantly clear that a ratio of punitives that is 6,250 times compensatory, obliterates any ratio previously upheld by this Court. Amici support Conrail's petition and request that this Court correct the errors below.

For the foregoing reasons, Amici respectfully request that Conrail's petition be granted so this Court may address the constitutional and national issues present in this case.

ARGUMENT

THE OHIO SUPREME COURT'S REFUSAL TO ADDRESS PETITIONER'S DUE PROCESS CHALLENGE THREATENS PRINCIPLES OF "OUR FEDERALISM."

The paradigm of "Our Federalism" recognizes that state supreme courts stand alongside federal courts as coequal guardians of justice. *See, e.g., Younger v. Harris*, 401 U.S. 37, 44 (1970); The Federalist No. 82 (Hamilton). This solemn authority carries with it the vital responsibility to recognize federal law as supreme, *Gulf Offshore Co. v. Mobil Oil Corp., et al.*, 453 U.S. 473, 478 (1981), and to zealously guarantee that all litigants enjoy a fair process which they are guaranteed under the Constitution of

the United States. The Ohio Supreme Court's failure to meet this sacred obligation jeopardizes the partnership between our federal and state courts and violates the basic guarantees our Constitution affords to all.

This Court has long held that the partnership between our federal and state court systems is premised on the relationship between our national government and states and that the two court systems exercise concurrent sovereignty. *Gulf Offshore Co. v. Mobil Oil Corp., et al.*, 453 U.S. 473, 478 (1981). Under the concurrent sovereignty doctrine, the Ohio Supreme Court could not be silent. *See, e.g., Gulf Offshore Co. v. Mobil Oil Corp., et al.*, 453 U.S 473, 477-478 (1981).

The framers of the Constitution did contemplate that state courts would address cases within the judicial cognizance of the United States in the exercise of their ordinary jurisdiction. *Martin v. Hunter's Lessee*, 14 U.S. 304, 340 (1816). The framers believed that judges of the state courts are, and always will be, of as much integrity, wisdom and learning as those of the court of the United States, and based on this highest level of confidence, fully expected state court judges would be called upon to make rulings based on federal law. *Martin v. Hunter's Lessee*, 14 U.S. at 346-347. By design, state courts were to decide both issues brought under state law and issues brought under the Constitution of the United States – "the supreme law of the land." *Martin v. Hunter's Lessee*, 14 U.S. at 340; *Younger v. Harris*, 401 U.S. 37, 52 (1971).

These pillars of integrity, wisdom and learning continue to uphold our founding fathers' vision. A weakening of any one pillar jeopardizes this hallowed principle.

This Court recently noted that in the age of campaign contributions to elected state officials, the pillar of integrity is subject to constant attack. *Nixon v. Shrink Missouri Gov't Pac, et al.*, ___ U.S. ___ (2000). Integrity can be diminished by a political quid pro quo, the impact of the appearance of corruption, and any influence that may tempt elected officials to act contrary to their obligation of office. *Nixon v. Shrink Missouri Gov't Pac, et al.*, ___ U.S. ___ (2000). Amici believe elected state officials, and especially judges, must be ever vigilant to preserve the pillar of integrity.

This Court must review whether the Ohio Supreme Court's silence, in response to petitioner's challenges to the substantial campaign contributions, erodes the pillar of integrity. The law bars state supreme courts from selectively enforcing constitutional protections within their courtrooms. Otherwise, litigants will inevitably experience a patchwork of disparate rulings on rights that are universally guaranteed. Forum shopping between the states and forum shopping to the federal bench will disrupt the basic precepts of Our Federalism, and further erode the pillar of integrity.

This threat to the pillars upholding Our Federalism and the concurrent jurisdiction of state and federal courts to uphold the Constitution warrants this Court's review and is a compelling reason to grant Conrail's petition for writ of certiorari.

THE OHIO SUPREME COURT'S SILENCE IN RESPONSE TO PETITIONER'S MOTION TO DISQUALIFY VIOLATES DUE PROCESS UNDER ANY TEST THIS COURT HAS EXPATIATED.

Generally, a state possesses the power to regulate the administration of justice within its jurisdiction. *Patterson v. New York*, 432 U.S. 197, 201-202 (1977). This power is subject only to the limitations of the Constitution. *Patterson v. New York*, 432 U.S. 197, 201-202 (1977).

This Court has zealously protected the fundamental rights afforded by our Constitution and closely guards the supremacy of our Constitution through its review authority. Throughout this nation's history, this Court has reviewed attempts of executives, legislatures, and lower courts to disregard the deep-rooted demands of fair play enshrined in the Constitution. *Joint Anti-Fascist Refugee Committee v. McGrath, et al.*, 341 U.S. 123, 161 (1951).

In these circumstances where litigants have raised a due process challenge upon the judiciary itself, this Court has repeatedly held due process requires that all courts be neutral, *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980), objective, *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 172 (1951) (Frankfurter, J. concurring), and fair. *Withrow v. Larkin*, 421 U.S. 35, 46 (1975). These essential elements of due process guarantee that all courts will apply the law with integrity, fairness and impartiality. These critical elements further guarantee that due process rights are protected in specific circumstances. This Court has espoused two tests to ensure that the essential elements of due process are satisfied in all judicial proceedings. These tests provide lower courts

with absolute rules when a litigant questions possible bias or favoritism within a court.

This Court's first test holds that a due process violation occurs where there is a mere possibility that a tribunal is biased. *Tumey v. Ohio*, 273 U.S. 510, 532 (1927). In *Tumey*, this Court held that anything that may possibly tempt a judge "not to hold the balance nice, clear and true" violates due process. *Tumey*, 273 U.S. at 532. This Court has applied this mere possibility test to disqualify justices even though they have no actual bias and they fairly apply the law to all. *In Re Murchison*, 349 U.S. at 136. This Court has reasoned that, in specific cases, disqualification is necessary because "justice must satisfy the appearance of justice." *In Re Murchison*, 349 U.S. at 136; *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 243 (1980); *Offutt v. United States*, 348 U.S. 11, 14 (1954).

This Court's second test holds that due process is violated where a court has an actual bias in a case pending before it. *Aetna Life Insurance Co. v. Lavoie, et al.*, 475 U.S. 813 (1986). "Actual bias" means a direct, personal, substantial and pecuniary interest in the matter. *Lavoie, et al.*, 475 U.S. at 824. Under this test, this Court held that due process does not tolerate a judge to act as "a judge in his own case." *Lavoie, et al.*, 475 U.S. at 824.

This Court has also declared that specific cases may require that both tests be applied. In *Taylor v. Hayes*, 418 U.S. 488, 501 (1974), this Court held that a due process inquiry required review of actual bias in addition to the appearance of bias. Justice Frankfurter in *Public Utilities Commission v. Pollack*, 343 U.S. 451, 466-467 (1952),

believed due process is violated where there is any hint of bias, no matter how remote.

Here, petitioner raised concerns that the campaign donations made to the campaign committees of two Ohio Supreme Court justices by opposing counsel and members of opposing counsel's family and firm during the pendancy of the case may have created the appearance of bias. Petitioner's concerns regarding the contributions were fully briefed and filed with the Ohio Supreme Court. See Ohio Supreme Court docket, Case 97-2342. Obviously, this issue was of such importance that respondent filed a brief in opposition with the court.

Inexplicably, the Ohio Supreme Court never addressed petitioner's due process concerns. It applied no test, no analysis, no explanation. It did not speak. See Ohio Supreme Court docket, Case 97-2342. Rather, the Ohio Supreme Court erroneously turned a blind eye to petitioner's concerns and the briefs of both parties. This inaction warrants this Court's review.

Due process protections and the intentions of the drafters of the Constitution are rendered meaningless, in cases such as these, if state courts are permitted to maintain silence when constitutional issues are raised before them. Litigants must be heard and courts must respond. Here, the Ohio Court had a duty to speak. The Constitution of the United States demands no less. This Court has consistently found due process violations to exist upon a showing that only a "probability of unfairness" existed in a tribunal. Accordingly, amici believe that due process contains no prerequisite that there be a finding of actual

bias in this case for petitioner's due process to have been violated.

Consequently, amici urge this Court to grant review of this case because petitioner's due process rights were violated. Silence is inconsistent with principles of neutrality, fairness and objectivity. Amici aver that the Due Process Clause affords absolute protections for litigants to be heard and for courts to respond where the integrity of the process is questioned. Our Constitution bars even the probability of unfairness. *Withrow*, 421 U.S. at 47, citing *In re Murchison*, 349 U.S. 133, 136 (1955). Any possibility that a judge or decision-maker may be biased is too high to be constitutionally tolerable. *Withrow*, 421 U.S. at 47.

Here petitioner was clearly denied such full protections. Only this Court can now correct this error. Therefore, amici respectfully request that Conrail's petition be granted.

A PUNITIVE DAMAGE AWARD IN AN AMOUNT 6,250 TIMES GREATER THAN THE ASSOCIATED COMPENSATORY DAMAGE AWARD IS UNCONSTITUTIONALLY EXCESSIVE.

This Court has consistently held that the due process clause of the Fourteenth Amendment imposes substantive limits "beyond which penalties may go," *TXO Production Corp. v. Alliance Resources Corp., et al.*, 509 U.S. 443, 453 (1993); *Seaboard Air Line R. Co. v. Seegers*, 207 U.S. 73 (1907), yet has refrained from devising a mathematical "bright line" between the constitutionally acceptable and the constitutionally unacceptable. *TXO*, 509 U.S. at 457.

Here, the Ohio Supreme Court affirmed a punitive damage award that is clearly unconstitutional and exceeds any mathematical "bright line."

The Due Process Clause of the Fourteenth Amendment limits the size of punitive damage awards. *See, Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994). A state exceeds that limit when its court imposes a "grossly excessive punishment on a tortfeasor." *BMW v. Gore*, 517 U.S. 559, 582 (1996). There must be a reasonable relationship between the punitive damage award and the compensatory award upon which it is based. *BMW*, 517 U.S. at 582. A ratio of punitive to compensatory damages of four to one was found to be "close to the line" but still constitutionally permissible. *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 23-24 (1991). A ratio of ten to one was found not to be "grossly excessive," *TXO*, 509 U.S. at 462, but this Court found a ratio of 500 to 1 breathtaking and unconstitutional. *Gore*, 517 U.S. at 583 (quoting *TXO*, 509 U.S. at 481 (O'Connor, J. dissenting)). Here, the ratio of punitive to compensatory damages is 6,250. This imbalance obliterates any ratio that this Court has held to be constitutional.

Punitive damages must be in proportion to the severity of the offense. *TXO*, 509 U.S. at 462. It is undisputed that (1) petitioner had operating rules in place at the time of the accident which required its train crews to flag a grade crossing when a train, stopped within 300 feet of a crossing, may obstruct a motorist's view of oncoming trains on adjacent tracks; (2) petitioner regularly tests its employees on its operating rules; (3) petitioner punished employees that disregarded its rules in this case; (4) since

the Wightman accident, petitioner has engaged in programs designed to make grade crossings safer, make accidents less likely, and make sure its employees are trained properly.

Punitive damages serve to punish and deter. On these facts, a $15,000,000 punitive damage award serves neither purpose. Here, the damage at issue was accidental property damage to a nine-year-old vehicle valued at approximately $2,400. This Court has held the Constitution requires that punitive damages be in proportion to the severity of the offense. Those guarantees were not enforced here. Accordingly, this issue warrants this Court's review.

CONCLUSION

This case clearly warrants this Court's review. The process by which the Ohio Supreme Court affirmed a $15 million punitive damage award was constitutionally invalid and violated petitioner's due process. The Ohio Supreme Court was afforded the opportunity to address petitioner's due process challenges, but did not. Inexplicably and without reason, the Ohio Supreme Court turned a blind eye to petitioner's concerns that the appearance of bias may have tainted the court, and then affirmed an unconstitutionally excessive punitive damage award. Silence in this regard is unconstitutional under any test or definition of due process this Court has expatiated. For the reasons heretofore stated, Amici

respectfully request that Conrail's petition for writ of certiorari be granted.

RICHARD HODYL, JR. *
MARK R. MISIOROWSKI
Attorneys for Amici Curiae
Alliance of American Insurers
National Association of
Independent Insurers
**Counsel of Record*

WILLIAMS & MONTGOMERY, Ltd.
Twenty North Wacker Drive
Suite 2100
Chicago, Illinois 60606
(312) 443-3200